1964

Build, Inc. v. John G. Italasano and Theo Italasano : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

BUILD, INC., a Utah Corporation,
Plaintiff and Respondent,

—vs.—

JOHN G. ITALASANO and THEO ITALASANO, his wife,
Defendants and Appellants,

No. 10093

APPELLANTS' BRIEF

Appeal from the Judgment of the Second District Court for Davis County, Honorable Thornley K. Swan, District Judge

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STATEMENT OF THE KIND OF CASE

This is an action for a sum claimed to be due and owing to the plaintiff corporation for constructing a home for the defendants in Bountiful, Utah, and the defendants counterclaimed alleging that they were damaged by plaintiff's failure to perform according to the terms of a contract between the parties.

DISPOSITION IN LOWER COURT

The case was tried to the court. From a judgment in favor of plaintiff in the amount of $3,483.44 together with costs, and no cause of action on the counterclaim, defendants appeal.

RELIEF SOUGHT ON APPEAL

Defendants seek reversal of the judgment and judgment in their favor, or that failing, a re-examination of the case in equity and a balancing of the equities between the parties

STATEMENT OF FACTS

Plaintiff corporation, essentially a one-man corporation owned and controlled by one Richard J. Stromness, a man with sixteen years' building experience (T. 3), constructed a home for the defendants on their own lot and foundation at 6393 South 4th East in Bountiful, Utah. Work commenced in about June of 1959 and was completed about March of 1960. It is the contention of plaintiff that there was a contract between the parties to build the home and that it was of the "cost-plus" type, i.e., the builder figures all his costs of building, then to this figure he adds a percentage for overhead and an additional percentage for profit. (T. 37).

Defendants on the other hand maintain that the contract to build the home was for a sum not to exceed $15,000.00 in any event (T. 125).

The agreement and arrangements between the parties to build the home were oral, and it is clear that plaintiff neglected to enter into a written contract when defendants inquired of him about it, and in fact didn't desire one (T. 160).

The learned Trial Court concluded that to effect substantial justice between the parties he would make a contract between them in equity (R. 29). In doing so the court took the total amount for materials and labor as contained in plaintiff's accounting and deducted the amounts paid directly to suppliers by defendants and all cash payments to plaintiff. This left the balance of $3483.44 for which the court rendered judgment in favor of the plaintiff (R. 29 and 30).

In making this contract between the parties, the court took into account only the disbursements of the plaintiff and didn't consider the additional disbursements of the defendants on the home, and the appraisal which was made at about the time of occupancy (R. 28-30).

ARGUMENT

POINT I.

THAT THE EVIDENCE DOES NOT SUPPORT A FINDING THAT THERE WAS NO CONTRACT BETWEEN THE PARTIES TO CONSTRUCT A HOME FOR DEFENDANTS FOR THE SUM OF $15,000.00 OR LESS, AND IT WAS ERROR FOR THE COURT TO WRITE A CONTRACT FOF THE PARTIES.

The difficulty of the parties here stems mainly from their lack of a written contract which plaintiff delcined to enter into before work began (T. 160).

Plaintiff contends that the contract to build the home was of the "cost-plus" type, i.e., materials and labor plus a markup for overhead and profit (T. 37) while de-

fendants contend that the agreement was to the effect that the cost was not to exceed $15,000.00 and was to be less, depending upon how much work Mr. Italasano and his family could do (T. 125).

We now examine the transcript to see which of these two positions is sustained by the weight of the evidence.

John G. Italasano testified that from the beginning of his discussion with Richard Stromness, president of plaintiff corporation, he emphasized that he had only $15,000.00—and his testimony is that Mr. Stromness (after studying the plans and specifications to the home for two months) said that the home could be built for $15,000.00 (T. 121).

It is true that defendant agreed to work himself, but this was to effect savings below the $15,000.00 figure (T. 122). It is also clear that Stromness knew that $15,-000.00 was all that was available for the work since he talked with defendant's employer who loaned defendants the money to build the home (T. 122). The agreement was clearly to the effect that the total expenditures by the defendant were not to exceed $15,000.00, and any saving below that figure was to inure to the defendants. (T. 125)

Plaintiff testified that in cost-plus work, a careful record of the work done is kept and a periodic accounting given to the owner (T. 5). Here no accounting was given to the owner till after the home was completed (T. 73), although plaitiff told defendant when the job was two-thirds complete that he was within the $15,000.00 figure (T. 29).

Plaintiff's expert on consrtuction contracts, Mr. Royal Atwood, didn't testify that this type of contract is customary for residential construction (T. 45), and had never heard of an entire building being constructed with this type of contract (T. 46). Cost-plus contracts are usually only for a part of the whole job or to finish work already provided for in a main contract (T. 48).

Defendants' witness, Terrell F. Beddingfield, a construction foreman for Skyline Construction Co., but formerly with Build, Inc., the plaintiff, testified that in the construction business, on cost-plus contracts, very few materials are shuttled from one job to another since the bookkeeping then becomes very burdensome.

The following question was asked the witness:

> Q. Is there a custom in the building and construction industry about shuttling materials back and forth from project to project, on these two different types of contracts (i.e. cost-plus and fixed amount) (T. 117)?

After much objection and strenuous efforts on the part of plaintiff's counsel to keep this evidence out of the record, the witness was allowed to answer:

> A. To the best of my knowledge, on cost-plus work, material is moved as little as possible, because of the bookkeeping involved to move it. On jobs that I personally have run, and been in a supervisory capacity over, every item has to be accounted for. And this was the reason it is not done in a cost-plus, any more than an absolute minimum (T. 118).

But materials were moved from one job site to another during the construction of the Italasano home (T. 98, 197 and 198). The witness Bedingfield, who had worked on the Italasano home, testified in response to a question asking if he had seen an exchange of materials between the Italasano project and St. Olaf's project:

> A. Oh, there was sheeting moved from the Italasano home to the St. Olaf's, and vice versa. Trim from St. Olaf's. And I believe there was a door moved from St. Olaf's to the Italasano home.
>
> Q. Who authorized this?
>
> A. Mr. Stromness (T. 98)

Nowhere on plaintff's accounting (Plaintiff's Exhibit A) do we see these items mentioned. This hardly shows a cost-plus contract—on the contrary, this evidence strongly supports a fixed-sum type of contract. There is more. The witness Beddingfield while examining the plans and specifications for the Italasano home quotes Mr. Stromness as saying that he had an offer to build this home for $15,000.00. He then mentioned that Mr. Stromness discussed with him how to figure the cost of construction (T. 95).

When the accounting in excess of $5,000.00 over the agreed upon price was finally prepared, Stromness went to his men and asked them to return this money for their labor on the home. Beddingfield testified that he and others who were present were informed that ". . . the

labor costs had, in Mr. Stromness' opinion, exceeded the agreed upon price, I assumed to be $15,000.00, and he felt that it was strictly labor. . . " (T. 97). It appears that when the plaintiff decided he hadn't come out on his bargain, he tried first to get some of his money back from his men. When he was unsuccessful in this, he turned to the defendants. It is very significant, however, that *he did not file a mechanic's lien.* Mr. Stromness is a licensed contractor; he is familiar with mechanic's liens and their significance, but nevertheless, he did't file one (T. 87). Why didn't he if his contract was cost-plus? It would appear that he would certainly file a lien if it were proper for him to do so. He is also aware that it is a misdemeanor to falsely file a lien (see 38-1-25, Utah Code Annotated, 1953). The failure of a licensed builder of considerable experience to file a lien doesn't show that the contract here was cost-plus, rather it shows that there was a fixed-sum type of contract wherein plaintiff would have had no recourse to the lien statutes.

The evidence clearly points to a contract for $15,000.00 or less. This is all the funds at defendants' disposal and the plaintiff was aware of this (T. 56 and 122). Defendant's testimony is to the effect that this was their agreement (T. 125). Plaintiff's contention that he was to supply only technical and skilled services and that defendants would do the actual work (T. 10) is not supported by the evidence. Among the first men sent to the Italasano job when work commenced was an apprentice carpenter (T. 94-96). Does this lend support to his testimony of supplying only skilled and technical assistance? We submit that it does not; on the contrary this

supports the contention of the defendants that there was a fixed-sum agreement here. Furthermore plaintiff admitted that he authorized his men to work long hours in other than technical and skilled capacities from the beginning (T. 76). This hardly substantiates his contention that he had a cost-plus contract with the defendants.

In view of the evidence which clearly shows a contract for the construction of the home for $15,000.00 it was improper for the Trial Court to find "That it was the understanding of the plaintiff that the plaintiff would furnish his organization, *** and would hold the construction costs as nearly as possible to $15,000.00 but that the plaintiff would be paid an amount equal to the costs expended by him plus ten percent for supervision." and that "It was the understanding of the defendants on the other hand that with the labor and material furnished by them the maximum cost to them was not to exceed $15,000.00" and it was error to award a judgment for $3483.44 to the plaintiff by "making a contract between the parties" (R. 29). Certainly the parties didn't embark upon a project so great as constructing a house without a contract! It is clear that the duty of the court is to interpret that contract, not rewrite or make one for the parties simply because the court feels it is necessary to rewrite the contract to effect justice between the parties. Competent parties are entilted to make their own lawful contracts or contractual arrangements, and it is not within the province or power of the court to alter, revise, modify or rewrite a contract by construction or to make a new or different contract for the parties be-

cause the court feels that justice would be served thereby. The duty of the court is confined to the interpretation and enforcement of the one which they have made for themselves. In this connection see the opinion of this court in *East Mill Creek Water Co. v. Salt Lake City*, 108 Utah 315, 159 P. 2d 863 (1945). The rule is further stated at 17 A C.J.S. Contracts, Sec. 296 (3), pages 96 and 97 as follows:

> The court may not rewrite the contract for the purpose of accomplishing that which, in its opinion, may appear proper, or, on general principles of abstract justice, or under the rule of liberal construction, make for the parties a contract which they did not make for themselves, or make for them a better contract than they chose, or saw fit, to make for themselves, or remake a contract, under the guise of construction, because it later appears that a different agreement should have been consummated in the first instance, *or in order to meet special circumstances or contingencies against which the parties have not protected themselves.* (Emphasis added.)

This court has ruled in the case of *Carlson* vs. *Hamilton*, 8 Utah 2d 272, 332 P. 2d 989 (1958) that the court may not rewrite contracts for the parties thereto, and that the parties are entitled to enter into any contract on their own terms—even if the resulting contract is unreasonable or may lead to hardship on one side. See also the case of *Cole* vs. *Parker*, 5 Utah 2d 263, 300 P. 2d 623 (1956) wherein this court stated: "The courts cannot supervise decisions made in the business world and grant relief when the bargain proves improvident."

It is also clear that a court of equity may not rewrite the contract for the parties. The rule is set out at 30 C. J. S., Equity, Sec. 63, page 411 as follows:

> A court of equity cannot **** make a contract for the parties, nor vary the terms of the one made, nor substitute another one therefor, nor can it remedy a wrong by making in effect a contract between the parties with reference to the subject matter.

POINT II.

THAT EVEN IF THIS COURT CONCLUDES THAT THE FINDINGS OF THE TRIAL COURT TO THE EFFECT THAT THERE WAS NO ACTUAL CONTRACT BETWEEN THE PARTIES WAS PROPER, THE RULING OF THE TRIAL COURT AND THE GRANTING OF THE JUDGMENT FOR $3,483.44 IS IMPROPER UNDER THE RULES OF EQUITY.

This court must review the evidence as well as the law on the appeal of a case in equity from the District Court. See *Constitution of Utah, Article VIII, Sec* 9. Therefore this appeal on the record from the District Court to ~~their~~ this court amounts virtually to a trial de novo. This position was clearly enunciated in *Jensen* vs. *Howell,* 75 Utah 64, 282 P. 1034 (1929) in the following language:

> This case is one in equity. In this jurisdiction the binding effect of findings of the trial court in law cases is different from that in equity cases. In the former, the findings, as a general rule, are approved if there is sufficient competent evidence to support them, and ordinarily, are not disturbed, unless it is manifest that they are so

> clearly against the weight of the evidence as to indicate a misconception, or not a due consideration of it. In the latter, our duty and responsibility in approving or disapproving findings when challenged are more comprehensive. In such case, *on an appeal and a review on questions of both law and fact, the review in effect is a trial de novo on the record.* (emphasis added)

Also in the case of *Dahlberg* vs. *Dahlberg,* 77 Utah 157, 292 P. 214 (1930) this court said at page 164, "(this case) being an action in equity, the parties, under our Constitution are entitled to our judgment, as well as that of the Trial Court." See also the following cases wherein this Court has held that its review of a case in equity is a trial de novo

> *Federal Land Bank of Berkeley* vs. *Salt Lake Valley Sand & Gravel Co., et al,* 96 Utah 359, 85 P. 2d 791 (1939)
> *Sipherd* vs. *Sipherd,* 83 Utah 245, 27 P. 2d 801 (1933)
> *Wallick* vs. *Vance,* 76 Utah 209, 289 P. 103 (1930)

Here the record as we have heretofore reviewed it clearly shows that Richard Stromness, president of plaintiff corporation who acted for it during the entire course of events which led to the difficulties of the parties herein, and a man with sixteen years' building experience, was certainly in a position to avert any loss or in effect head off any difficulties with over spending on this home. It was his responsibility to keep the books and records of the work and expenditures. By his own testimony it was his duty to give periodic, accurate and detailed accountings to the defendants.

This he failed to do even though he knew that the defendants only had $15,000.00 to finance the building of this home (T.7). The record is also certain that he didn't properly supervise and control his men and their work and yet they continued to work and charge large amounts of labor against the home—sometimes even some on Sundays or holidays, and even during a period of at least one month when Stromness was out of town. (T. 79).

There was no supervisor present on the job to direct the work of the men (T. 96), and plaintiff didn't file mechanic's liens (T. 87), but he did try and get some of the money back that he had paid his men who had worked without supervision (T. 97). Certainly it was Mr. Stromness' duty to supervise his men and keep labor costs in line—they were not working for Mr. Italasano (T. 97). If there has been injury here, plaintiff is the party who was in the better position to forsee the problem and to prevent the injury, and if he failed to do so, he must bear any loss. As stated at 19 *American Jurisprudence,* Equity, Sec. 482, pages 334 and 335:

> If their claims are not shown to be equal, the decision should be against the party who has the weaker or inferior equity; and this party is the one who is shown to have been in the better position to avert the loss, injury, or prejudice which now must be borne by the other. A determination of the issue is governed by the proof as to the *relative knowledge of the parties or their means respectively of forseeing the dilemma* which has come into existence. (emphasis added)

If the relative positions of the parties in equity are equal, the parties must remain in their respective positions as is borne out by the following language from the same section set out immediately above:

> One who institutes suit against another must be prepared to show a prior or superior equity in himself. If the equity of the one party is shown to be equal to the equity of the other—that is if one was as well situated as the other to forsee and prevent the prejudicial situation—the loss or harm must be borne by the party on whom it has fallen.

Even assuming that both parties are "innocent," i.e. ignorant of the harmful consequences of their acts, the one committing the act or acts which caused the harm must bear any loss in this connection. See 19 *American Jurisprudence,* Equity, Sec. 483, page 335, wherein the following maxims are set forth:

> Where one of two innocent parties must suffer, he through whose agency the loss occurred must bear it.

And also:

> Where one of two parties, both guiltless of intentional wrong, must suffer a loss, the one on whose conduct, act, or omission occasions the loss must stand the consequences.

The district court in writing a contract in equity for the parties looked only to the actual disbursement of the plaintiff in determining what was equitable. The appraisal of the home which was made on April 11, 1960 —almost immediately after occupancy — was not con-

sidered by the court in arriving at its decision although the appraisal was admitted into evidence as Defendants' Exhibit 4. An examination of the appraisal in its entirety reveals that the home in question had an appraised valuation before depreciation of $20,128.00 including the garage, but not the lot.

The defendants' contributions to the value of the home should certainly be taken into account in arriving at a just and equitable balace of the equities between the parties, if the court must write a contract for them. The record shows that defendants had already placed the footers and foundations which were worth at least $800.00 and perhaps as much as $1500.00 (T. 210), carpets and drapes were $1700.00 (T. 210), at least 1000 hours of the defendant's own work which if figured at an ultraconservative $1.75 per hour would be worth $1750.00 (T. 136). These items coupled with the fact that $15,800.00 (T. 131) was paid out directly shows that the defendants contributed the sum of over $20,000.00 toward a home which is valued at slightly over $20,000.00. If the judgment granted by the trial court in the amount of nearly $3500.00 is allowed to stand, this means that defendants will be placed in the position of losing at least $3500.00 while plaintiff would be held relatively harmless. Wherein lies the equity of the Trial Court's decision when such a result follows? If the court felt that the appraisal was not accurate, the defendants stood ready to supply any appraisal desired (T. 208).

CONCLUSION

The record shows that these parties had a contract wherein the plaintiff agreed to construct a home on the defendants' lot and foundation for a sum not to exceed $15,000.00. The court's clear obligation is to enforce that contract, and certainly not to rewrite the contract for the parties. The rules of equity do not permit the court to rewrite a contract or construe one so that an inequity results. Even if this court should determine that the district court acted properly in writing a contract for the parties in equity, the value of the home as indicated by the appraisal should be considered by this court in arriving at an equitable solution of the parties' problems.

The judgment of the Trial Court should be reversed and judgment entered for the defendants.

Respectfully submitted,

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